IN THE SUPREME COURT OF MISSOURI

SC 94844

RUTH MICKELS, et al.,
Appellants-Plaintiffs,

v.

RAMAN DANRAD, M.D.,
Respondent-Defendant.

Appeal from the Circuit Court of Marion County, Missouri
Case No. 12MR-CV00727
Judgment dated February 10, 2014
Honorable Rachel Bringer Shepherd

Transferred after Opinion from the Eastern District
Court of Appeals (ED 101147) by Order of this Court

RESPONDENT'S SUBSTITUTE BRIEF

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A. Background

On June 7, 2012, Appellants' filed a Petition in the Circuit Court of Marion County, Missouri, for the wrongful death of Joseph B. Mickels (hereinafter "Mr. Mickels"). LF0010. Appellants named a number of defendants in their initial petition but by the time the matter was ready for trial, the sole defendant was Raman Danrad, M.D. LF00043; LF00048; LF0165. Appellants' Petition contained one count against Dr. Danrad. LF0011-LF0042. Appellants' cause of action against Dr. Danrad was for wrongful death based upon medical negligence for failure to diagnose. LF0030-LF0034.

B. Decedent's Medical History

Dr. Raman Danrad is a medical doctor with a specialization in radiology imaging. LF0132, #1; LF 0081, pg. 42. On December 12, 2008, an MRI was taken of Mr. Mickels brain and Dr. Danrad reviewed the MRI that same day. LF0132, #2. Dr. Danrad did not read the MRI of December 12, 2008, as showing that Mr. Mickels' had a brain tumor. LF0132, #3.

On February 17, 2009, a CT scan was performed on Mr. Mickels' head. LF0133, #4. Dr. Danrad reviewed the CT scan the same day and observed brain tumors in Mr. Mickels' right temporoparietal lobe. LF0133, #4. Following this observation, Mr.

Mickels was transferred to the University of Missouri Medical Center. LF0119, p. 16. Three days later, on February 20, 2009, Mr. Mickels underwent brain surgery to remove the tumors. LF0092, p.25. Mr. Mickels' tumors were later determined to be cancerous. LF0134, #9. Mr. Mickels died on June 12, 2009. LF0090, p.16.

C. Plaintiff's Expert Testimony

Appellants designated Dr. Richard B. Schwartz as one of their expert witnesses. LF0133, #6. Dr. Schwartz is a radiologist with special training in neuroradiology. LF0134. Dr. Schwartz testified that patients with the type of tumors that Mr. Mickels had generally do not do well over time and their survival is generally measured in months to years. LF0134, #10. Based upon the type of brain tumor that Mr. Mickels had his prognosis was grim. LF0134, #11. Dr. Schwartz did not render any opinions with respect to the cause of Mr. Mickels's death. LF0134, #8. Dr. Schwartz stated that he would defer to an oncologist with respect to Mr. Mickels' life expectancy if the tumors had been diagnosed in the December 12, 2008 study. LF0135, #12.

Plaintiff's also designated Mr. Mickels's treating oncologist, Dr. Carl Freter, as their expert witness. LF0135, #14. Dr. Freter testified that Mr. Mickels's brain tumors were very aggressive. LF0135, #15. Mr. Mickels' tumors were as aggressive of brain tumors as they come. LF0135, #16. The type of brain tumors that Mr. Mickels had tend to be multiple in nature and they tend to be recurrent, even when the tumor has been removed by various combinations of surgery, radiation therapy, and chemotherapy. LF0136, #18. Further, even when surgery is performed on this type of tumor, a neurosurgeon cannot remove the entire tumor. LF0136, #20. This type of tumor grows

out with fine tendrils of cells into the brain which makes removing the entire tumor impossible. LF0136, #20.

The details and the progression of Mr. Mickels' brain tumor in relation to the date of his death is indicative of the natural history of the type of brain tumor that Mr. Mickels had, even in the face of therapy. LF0136, #17. As stated by Plaintiff's own expert, Dr. Carl Freter, the type of tumor that Mr. Mickels had was fatal. LF0136, #19; LF0137, #23.

Dr. Freter also stated that even if Dr. Danrad had read the MRI of December 12, 2008 as showing a tumor, and the tumor had been treated correctly, Mr. Mickels at most would have only lived a number of months longer. LF0136, #21. Even if the tumor had been diagnosed in December 2008 and Mr. Mickels received the correct treatment, Dr. Freter guesstimated that Mr. Mickels would have, on average, lived six months longer. LF0137, #22. Dr. Freter further noted that even if the tumor had been identified in December 2008, it would not have made an enormous difference in Mr. Mickels life span. LF0138, #24. Dr. Freter could only say that Mr. Mickels' perhaps, on average, might have lived six months longer. LF0152, #26.

POINT RELIED ON

POINT I: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS ESTABLISHED THAT RAMAN DANRAD, M.D. DID NOT CAUSE DECEDENT'S DEATH AND SUMMARY JUDGMENT WAS APPROPRIATE AS A MATTER OF LAW IN THAT MISSOURI PRECEDENT ESTABLISHES THAT FOR CAUSATION TO EXIST ON A CLAIM FOR WRONGFUL DEATH BASED UPON MEDICAL NEGLIGENCE, THE PLAINTIFF MUST ESTABLISH THAT "BUT FOR" THE DEFENDANT'S NEGLIGENCE THE DECEDENT WOULD NOT HAVE DIED

Wollen v. DePaul Health Center, 828 S.W.2d 681 (Mo. banc 1992).

Sundermeyer v. SSM Regional Health Services, 271 S.W.3d 552 (Mo. banc 2008)

Super v. White, 18 S.W.3d 511 (Mo. App. W.D. 2011).

Morton v. Mutchnick, 904 S.W.2d 14 (Mo. App. W.D. 1995).

ARGUMENT

Missouri precedent is clear – a wrongful death claim does not exist in the context of a medical negligence action for failure to diagnose, where the decedent had a terminal illness and the terminal illness was going to cause the individual's death. *See Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. banc 1992). A cause of action does not exist in this scenario as the fact pattern does not meet the requirements of "but for" causation. Legal precedent in Missouri mandates that the tortfeasor must be the cause in fact ("but for" causation) and the proximate cause of the individual's death. This Court has stated that "but for" causation in the context of a wrongful death action requires a plaintiff to show that but for the actions or inactions of the defendant, the decedent would not have died. *Sundermeyer v. SSM Regional Health Services,* 271 S.W.3d 552, 554 (Mo. banc 2008); *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012); *See also, Watson v. Tenet Healthsystem, Inc*, 304 S.W.3d 236, 240 (Mo. App. E.D. 2009). Here, Appellants cannot establish that Dr. Danrad was the cause in fact or proximate cause of Decedent's death as Mr. Mickels was going to die from brain cancer without regard to the actions of Dr. Danrad. Accordingly, since Dr. Danrad's omission was not the cause in fact or the proximate cause of Ms. Mickels's death, summary judgment was appropriate under the law. Furthermore, Missouri does not recognize a cause of action for loss of chance of extended survival or the failure to prolong an individual's life when the action or omission complained of is the failure to diagnose a terminal illness.

I. Standard of Review

On appeal, the grant of summary judgment is essentially reviewed *de novo*. *ITT Comm. Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The court is to review the record in the light most favorable to the party against whom judgment was entered. *Id.* The facts set forth by the moving party are taken as true unless contradicted by the non-moving party. *Id.* The reviewing court's test for the propriety of summary judgment is no different than those employed by the trial court in rendering a decision on the motion. *Id.* The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue as to any material fact required to support that right to judgment. *Id.* at 378. Genuine issues are issues or disputes that are real and substantial, not issues that are merely of conjecture, theory and possibilities. *Id.*

"Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Id.* at 376. "The purpose of summary judgment ... is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant." *Id.* at 380. Where the facts are not in dispute, the prevailing party can be determined as a matter of law. *Id.* at 376. Summary judgment entered on a properly plead and supported motion does not deny due process. *Id.* at 378.

Here, summary judgment was requested by the "defending party." A "defending party" may establish a right to summary judgment by showing (1) facts that negate any

one of the claimant's elements, (2) that the non-movant, after an adequate period of discovery, has not been able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-plead affirmative defense. *Id.* at 381. Any one of these three means can establish a right to summary judgment where the underlying facts are beyond dispute. *Id.* Dr. Danrad requested summary judgment as the undisputed facts negated one of the elements of a cause of action for wrongful death based upon medical negligence for failure to diagnose. Specifically, Appellants could not establish that Dr. Danrad caused Mr. Mickels's death.

II. Appellants cannot establish that Dr. Danrad was either the cause in fact or the proximate cause of Mr. Mickels's death

The type of claim brought by Appellants is a claim for wrongful death based upon medical negligence. In a wrongful death case based upon medical negligence, the Plaintiff must establish that "but for" the defendant's actions or inactions the decedent would not have died. *Sundermeyer*, 217 S.W.3d at 554. In Missouri, "but for" causation is the minimum standard of causation that a plaintiff must prove to meet his or her burden of proof.

Appellants cite the Western District case of *Wilson v. Lockwood*, 711 S.W.2d 545 (Mo. App. W.D. 1986) for the elements of a medical negligence claim. *Wilson* does not set forth the elements for a wrongful death claim based upon medical negligence which have been adopted by this Court. *See Watson*, 304 S.W.2d at 240; *Sundermeyer*, 271

S.W.3d 552. Appellants are utilizing the *Wilson* case to muddy the waters on the causation standard in a wrongful death case when, in fact, the *Wilson* case was not a wrongful death case at all but was a straight medical malpractice claim.

The elements of a wrongful death claim based upon medical negligence are: (1) doctors failed to meet a required medical standard of care; 2) doctors' acts or omissions were performed negligently; and (3) doctors' act or omissions caused decedent's death. *Sundermeyer*, 271 S.W.3d 552 (Mo. banc 2008). This Court has held on numerous occasions that the third element requires the plaintiff to establish that "but for" the actions or inactions of the defendant, the decedent would not have died. *Sundermeyer*, 271 S.W.3d at 554; *Sanders*, 364 S.W.3d at 208; *Watson*, 304 S.W.2d at 240.

A. "But for" causation

This court started to analyze causation in the context of a wrongful death claim based upon medical negligence in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. banc 1992). In *Wollen*, the plaintiff claimed that the failure to timely diagnose a patient's cancer caused the patient's death. In *Wollen*, the trial court dismissed the plaintiff's petition for failure to state a cause of action because the trial court found that the petition did not "plead a causal connection between respondents' negligence and the death of" decedent. *Id.* at 681. The Supreme Court noted that because they were examining the matter in the context of a motion to dismiss they had to accept the allegations in the plaintiff's pleading as true. *Id.* As such, the Court accepted that if the doctors had performed the appropriate tests and if the doctors had correctly interpreted the tests that were conducted, the doctors would have correctly diagnosed the decedent

with gastric cancer. *Id.* at 681-82. The Court also accepted as true that if the decedent's gastric cancer had been appropriately diagnosed and treated, he would have had a thirty percent (30%) chance of survival and cure. *Id.* at 682. The Court stated that its determination on the matter turned "on the issues of proof and causation." *Id.*

In *Wollen,* this Court stated that in the context of a failure to diagnose case, the plaintiff must show that there is a reasonable medical or scientific certainty that defendant's negligence caused the harm. *Id.* The Court noted that there are three situations that arise in the context of "medical certainty" in a failure to diagnose case. *Id.* First, is the situation that this Court deemed and termed, the "but for" causation scenario. *Id.* In the "but for" scenario, the patient has a disease for which, at the stage treatment is sought, there is a cure that works in the overwhelming majority of cases. *Id.* In this scenario, death from the disease is rare, unless the doctor is negligent at some stage in the treatment process. *Id.* The second scenario, and the one at issue in this case, is where there is no known cure for the disease. *Id.* In the second scenario, it is medically certain that the patient will die, and the best that science could do is to extend the patient's life for a short time. *Id.* Last, is the scenario where medical certainty does not exist as there is treatment that works in a large number of cases but the treatment also fails in a large number of cases. *Id.* In the third situation, there is a chance the patient will survive and a chance that the patient will die from the disease, even if the disease is properly diagnosed. *Id.* In the third situation, the case cannot go forward as an expert cannot state within a "reasonable degree of medical certainty" that the failure to diagnose had any effect.

In its discussion, the Supreme Court indicates that "but for" causation does not exist in the situation where a patient has a terminal illness. *Id.* Instead, the "but for" scenario of causation exists when the patient has a disease for which, at the stage treatment is sought, there is a cure that works in the overwhelming majority of cases. *Id.* Ultimately, this Court held that the plaintiff in *Wollen* did not state a cause of action for wrongful death as, "the petition fail[ed] to allege facts that show[ed] that respondents' alleged negligence caused [decedent's] death." *Id*. at 683. Here, no matter when Mr. Mickels's cancer was diagnosed his chance of survival was zero percent. In light of this Court's determination that an individual with a 30 percent chance of survival could not state a claim for wrongful death, an individual with a zero percent chance of survival cannot maintain a cause of action for wrongful death.

This Court again examined causation in a medical negligence case in the matter of *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993). It is important to note that this case was not a wrongful death case but was a straightforward medical negligence case. In discussing causation, this Court noted that "but for" causation provides that the "the defendant's conduct is a cause of the event if the event would not have occurred 'but for' that conduct." *Id.* at 860-61. "But for' is an absolute minimum for causation because it is merely causation in fact." *Id.* at 861.

In 2008, this Court applied *Callahan* when it examined causation in the context of a wrongful death medical negligence action. In *Sundermeyer*, this Court held that for the plaintiff to survive summary judgment on the issue of causation, he had to demonstrate that there were "genuine issues of material fact regarding whether [the defendant's]

conduct was … the cause in fact" of death. *Sundermeyer*, 271 S.W.3d at 554. This Court pronounced that in "wrongful death actions, plaintiffs must establish that, but for the defendant's actions or inactions, the patient *would not have died*." *Id. (*emphasis added).

Lastly in 2012, this Court again discussed "but for" causation in the context of a wrongful death action based upon medical negligence. *Sanders v. Ahmed*, 364 S.W.3d 195, 208 (Mo. banc 2012). In *Sanders*, the Court held that a plaintiff must establish two types of causation in such an action. The plaintiff must establish not only "but for" causation but she must also establish "proximate" causation. *Id.* The *Sanders* court reiterated that "but for" causation, in a wrongful death action, means that the plaintiff must show that "but for" the Defendant's actions or inactions, the patient would not have died. *Id*. at 209.

B. Proximate Causation

A plaintiff must also prove proximate causation. *Sanders*, 364 S.W.3d at 210. "Proximate causation 'requires something in addition to 'but for' causation because the 'but for' causation test serves to only exclude items that are not causal in fact." *Id.* Proximate causation requires the injury to be the reasonable and probable consequence of the act or omission of the defendant. *Id.* "This is generally a lookback test but, to the extent it requires that the injury be the 'natural and probable' consequence of an act, it includes a sprinkling of foreseeability." *Id.* Proximate cause is a question for the court to determine. *Kivland v. Columbia Orthopedic Group, LLP*, 331 S.w.3d 299, 309 (Mo. banc 2011). Proximate causation is established by evidence that the injury or death suffered was the "natural and probable consequence of the defendant's conduct." *Id.* In

this case, this would require the Court to determine that decedent's death was the natural and probable consequence of Dr. Danrad's alleged failure to diagnose a tumor on December 12, 2008. Here, Mr. Mickels's death was not the result of Dr. Danrad's failure to diagnose the tumor. Instead, Mr. Mickels's death was the natural and probable consequence of his cancer.

C. Analysis

Appellants skirt the issue of "but for" causation and never actually establish how the facts of this case establish a genuine dispute as to material facts. Instead of focusing on the "but for" test previously and repeatedly enunciated by this Court, the Appellants argue that Dr. Danrad should be liable as he "contributed to" Mr. Mickels's death. This argument is not supported by prior legal precedent.

The majority of cases authored by this court regarding a wrongful death claim for medical negligence have held that the standard of causation requires the plaintiff to establish that "but for the defendant's actions or inactions, the patient would not have died." *Sundermeyer*, 271 S.W.3d at 554; *Sanders*, 364 S.W.3d at 209. The indication that causation can be shown by evidence that the negligence of the defendant "directly contribute[d] to cause" the injury, first appears in the case of *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d at 863. As previously noted, *Callahan* was not a wrongful death cause of action but a straightforward medical negligence case. From that point, the "directly contributed to cause" language appears in *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d at 306 and *Sanders v. Ahmed*, 364 S.W.3d at 208. The court in *Kivland* cites to *Callahan* for that proposition and then the Court in *Sanders* cites to

Kivland. Accordingly, all of the citations for this principle flow from a case that was not a wrongful death case.

Further, in looking at the portion of *Callahan* that contains the "directly contributed to cause" language, this Court stated:

> All of this discussion concerning the semantics of causation is less important in Missouri than in most jurisdictions because under MAI we do not use the terms 1) "proximate cause," 2) "but for causation," or 3) "substantial factor" when instructing the jury. We merely instruct the jury that the defendant's conduct must "directly cause" or "directly contribute to cause" plaintiff's injury. *See MAI 19.01 [1986 Revision] Verdict Directly Modification – Multiple Causes of Damage.* ...MAI contemplates that the lawyers may explain the precise meaning of the instructions in closing arguments.

Thus, while jury instructions use the words "directly cause" or "directly contribute to cause" the true test of causation is the "but for" test. *See Sundermeyer*, 271 S.W.3d 3d at 555. In light of precedent on this issue, this means that the jury would be informed that the standard truly requires them to find that "but for" the actions or inactions of Dr. Danrad, Mr. Mickels would not have died. *See Callahan*¸ 863 S.W.2d at 863

"But for" causation and proximate causation are already directly reflected in the jury instructions governing wrongful death. Missouri Approved Jury Instructions 20.01 and 20.02 govern claims for wrongful death. (Appendix, #1). Missouri Approved Jury Instruction 20.01 states as follows:

20.01 Wrongful Death- Single negligent act submitted

Your verdict must be for plaintiff if you believe:

First, plaintiff was (*here insert statutory qualifications required to bring the action*), and

Second, defendant violated the traffic signal, and

Third, defendant was thereby negligent, and

Fourth, as a direct result of such negligence, *(insert name of decedent)* died.[1]

While the above is a sample jury instruction for wrongful death as a result of an automobile accident, it still denotes how causation is viewed. The fourth element makes it clear that the jury must find that death was a direct result of the negligence of the defendant. The fourth element does not allow for a finding based upon a determination that defendant "might have" or "possibly" caused the death. Additionally, this Court reviewed the aforesaid jury instruction in *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 310 (Mo. banc 2011). In *Kivland*, the court noted that the causation standard in a wrongful death action requires a showing that the death was a "direct result" of the negligence. *Id*. at 309. The Court further noted in its analysis of the case, it was not making any changes to the causation standard for wrongful death and that no modifications to the MAI instructions for wrongful death were necessary as the current instructions were perfectly adequate to submit the issue of causation. *Id*. at 310.

[1] The jury instruction for Multiple Negligent Acts found in MAI 20.02 contains the same standard of causation. MAI 20.02 states, "Fourth, as a direct result of such negligence (*insert name of decedent)* died.

In light of the law on causation, Appellants cannot establish causation in this case. Appellants cannot establish "but for" causation or proximate causation. The undisputed facts establish that decedent had terminal cancer. LF0136, #19. The type of tumor that decedent had was fatal. LF0136, #19. Decedent was going to die from the type of brain tumor that he had. LF0138, #25. Even if the tumor had been discovered in December 2008, the cancer would have been incurable. LF0137, #23. Because of the type of tumor that decedent had, his prognosis was grim. LF0134, #11. This was the testimony of Appellant's own expert witnesses. The undisputed facts show that once decedent had this type of cancer, he was going to die. The undisputed facts establish that Appellants cannot show that "but for" the actions or inactions of Dr. Danrad, decedent would not have died. Further, Appellants cannot establish proximate causation as Mr. Mickels' death was not the natural and probable consequence of any alleged failure to diagnose; instead, Mr. Mickels' death was the natural and probable consequence of the cancer. Therefore, Appellants cannot establish causation in this case.

Finally, while Appellants try to create a factual dispute, their argument does not hold up when viewed in the context of the law. Appellants argue that there is a genuine dispute as to material facts as their expert stated that decedent might have lived six months longer with an earlier diagnosis while Respondent's expert stated that an earlier diagnosis would not have mattered. However, the divergence in the expert's opinions does not create an issue of material fact as even if the court were to accept Appellants

argument, their claim would still fail as a matter of law.[2] Appellant's claim would still fail as decedent would still have died according to their expert. Decedent's death was caused by his terminal illness, not the failure to see a tumor in the December 2008 study.

Accordingly, there are no material facts in dispute and summary judgment was appropriate as a matter of law. The trial court's decision should be affirmed.

III. The law requires Appellants to show that the decedent would not have died and does not focus on whether the decedent would have died "at that time".

The causation standard in a wrongful death action based upon medical negligence for failure to diagnose requires the plaintiff to establish that the decedent would not have died. The law does not state that causation is established by showing that the decedent would not have died "at that time". Changing the causation standard in the manner requested by Appellants would create a new cause of action in Missouri for loss of chance of extended survival or for the failure to prolong an individual's life when the action or omission complained of is the failure to diagnose a terminal illness. Such a cause of action does not comport with prior precedent of any court in this state. Moreover, Appellants request is not in line with decisions from other jurisdictions that have examined this issue.

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[2] Dr. Allen's deposition excerpt was provided to the trial court. See Respondent's Supplemental Legal File. Also, Respondent will note that in the event this matter proceeds to trial, he will argue that the timing of the diagnosis did not affect decedent's life expectancy and Respondent is not waiving the ability to make such an argument.

A. Caselaw Cited by Appellants

Appellants rely heavily upon *Collins v. Hertenstein*, 90 S.W.3d 87 (Mo. App. W.D. 2002). Such reliance is misplaced. The portion of the *Collins* opinion cited by Appellant is merely dicta on the issue of causation. As noted by the Missouri Court of Appeals for the Eastern District, *Collins* is distinguishable from this case as the decedent in *Collins* did not have a terminal illness that would have caused his death regardless of defendant's actions. Further, the legal question in *Collins* was entirely different that the issue presented here. The issue in *Collins* was what actions can combine to form a single, indivisible injury for the purposes of joint and several liability.

In *Collins*, a 13 year old child was shot to death by three police officers. *Id.* The child who was killed was not suffering from a terminal illness. The experts in *Collins* stated that with respect to two of the officers, the bullets they fired alone would have been sufficient to cause the child's death. However, the expert stated that a bullet fired by the third officer would not have been sufficient to cause the child's death. *Id.* The trial court then granted the third officer's motion for judgment notwithstanding the verdict because the court found that the third officer did not cause or contribute to cause the child's death. *Id.* at 92. The Western District then examined this issue in light of Missouri law on independent negligent acts that combine to cause a single indivisible injury. *Id.* at 94. The Missouri Court of Appeals for the Western District noted that "Missouri law recognized that where persons whose independent negligent acts coalesce to cause a single indivisible injury, each person may be jointly and severally liable for all

the harm caused." *Id.* (Citing *Brickner v. Normandy Osteopathic Hospital, Inc.*, 687 S.W.2d 910, 912 (Mo. App. 1985).

The Western District determined that, in the context of cases dealing with single indivisible injuries, an individual's conduct need not have been the sole cause of death. *Id.* Instead, the individual's conduct only needs to have been a contributing cause. *Id.* The Western District then briefly addressed "but for" causation. The Court reasoned that in a wrongful death action when a plaintiff relies on medical experts, the experts must testify within a reasonable degree of medical certainty, that, but for the defendant's negligence, the victim's death would not have occurred. *Id.* at 95-6. The court then, relying on a case from Idaho, made a one sentence statement noting, "an act which accelerates death … causes death." *Id. at 96.* The court immediately following that statement went on to say, "Although Thomas' gunshot alone should not have caused Wilson's death, the jury could have found that Thomas' acts coalesced with those of Hertenstein and Keeney to hasten Wilson's death; hence, the jury reasonably concluded that the bullet Thomas fired contributed to cause a single, indivisible injury for which Thomas could be held liable." *Id.* at 96. (Emphasis added). It is clear that the court's discussion was in regard to when concurrent acts constitute a single indivisible tort and that the court was not creating any precedent with respect to causation in the context of a wrongful death case based upon medical negligence for the failure to diagnosis.

Appellants next cite the cases of *Strode v. St. Louis Transit Co.*, 95 S.W. 851 (Mo. 1906) and *De Maet v. Fidelity Storage, Packing & Moving Co.*, 132 S.W.732, 733 (Mo. 1910). In *Strode*, the Court indicated that the defendant who hit the decedent with a

streetcar could be held liable for wrongful death even if the decedent would have died of another disease anyway. *Strode*, 95 S.W. at 851-52.[3] In *De Maet*, this Court concluded that a defendant who ran over decedent with a horse-drawn buggy could be liable for wrongful death even if the decedent had other diseases that would have terminated his life. *De Maet*, 132 S.W. at 733. In both of these actions, affirmative acts of negligence caused the decedent's death. The defendant's actions were the competent force that brought about the death. Further, the cause of death was something other than the illness or disease itself.

The facts of these two cases are analogous to a scenario discussed by the Court of Appeals for the Western District of Missouri in *Morton v. Mutchnick*, 904 S.W.2d 14 (Mo. App. W.D. 1995). In *Morton*, the court noted that an individual who murders a terminally ill patient can still be guilty of murder and liable for the death of the individual. *Morton*, 904 S.W.2d at 16. The court indicated that the mechanism of the murder (i.e. gunshot wound, stab wound, etc.) is "the competent force that brings about death." *Id.* "An incurable disease does not prevent one from maintaining a successful cause of action for damages." If there is a cause of death, other than the terminal illness

[3] Appellants' place emphasis on the Court's decision, in *Strode*, to reject an instruction that stated that the injuries received in an accident only hastened death. However, the Court's opinion merely stated that the instruction was erroneous. The opinion did not state why the instruction was erroneous nor did the Court discuss how the instruction should be corrected.

itself, then the causation element can be satisfied. *Id.* The court illustrated that point by referencing the case of *Kilmer v. Browning*, 806 S.W.2d 75 (Mo. App. 1991). The court noted that in *Kilmer* a wrongful death action proceeded against a landlord and a gas company where the plaintiff had HIV but died of carbon monoxide poisoning. *Morton*, 904 S.W.2d at 16.

Here, unlike *Strode* or *De Maet*, the cause of Mr. Mickels's death was not caused by another independent accident such as a car crash or gunshot wound. The cause of Mr. Mickels's death was his brain cancer. The cause of Mr. Mickels's death was the same whether he died on June 12, 2009, or whether he died six months later. The alleged actions or omissions of Dr. Danrad had no effect on the cause of Mr. Mickels's death.

Appellants next examine the Massachusetts case of *Coburn v. Moore*, 68 N.E.2d 5, 7-8 (Mass. 1946). There are major factual differences between *Coburn* and the case at issue. In *Coburn*, the issue was a missed diagnosis of pneumonia, which was not noted to be a terminal illness. *Id.* The death certificate stated that the main cause of death was Vincent's angina, complicated by tines corpiris and terminal bronchopneumonia. *Id.* at 10. There was no indication that either Vincent's angina or tines corpiris were terminal illnesses. A major contention of negligence was that the doctor who had missed the diagnosis of pneumonia sent the patient 60-70 miles from the hospital. *Id.* 8-9. The court stated, "…it was bad practice …to move a patient who … had pneumonia out of one hospital to another …, that such removal might contribute to his death, and that it is the using up of a man's strength that causes a man's death when he has a condition like pneumonia." *Id.* at 9. While decedent already suffered from another disease the failure

to properly diagnose and treat the pneumonia, along with sending the patient away from the hospital, "combined and contributed" to cause death. *Id.* at 10. An examination of these facts shows that *Coburn* was nothing more than a straightforward medical negligence claim. It was not a claim involving the failure to diagnose a terminal illness. In *Coburn*, if the decedent had been properly diagnosed and treated he could have lived; there was a chance of survival given a proper diagnosis.

The Rhode Island case of *Petro v. Town of West Warwick*, 889 F.Supp.2d 292 (D.R.I 2012) is also factually and legally dissimilar from the case at hand. *Petro* involved claims brought pursuant to 42 U.S.C. § 1983 against law enforcement officers. The matter did not involve any action against medical professionals nor did it involve the failure to diagnose an illness. In *Petro*, the decedent, after being illegally seized, was involved in an altercation with law enforcement officers. *Id.* at 305-07. The altercation with law enforcement caused decedent to suffer cardiac arrest while being transported to the police station due to pre-existing heart abnormalities. *Id.* at 318-19. Plaintiff's experts testified that if decedent had not been in the altercation he would not have suffered cardiac arrest and died. *Id.* at 319. The court noted that after the police officers noticed that the decedent was unresponsive they waited several minutes to begin performing CPR. *Id.* The plaintiff's experts testified that if the officers had timely started CPR, even in light of the cardiac event, decedent's chance of survival was "greater than fifty percent." *Id.* at 320. Defendant's own expert did not take issue with this assessment. *Id.* In examining causation, the court noted, "it was the cardiac arrest, coupled with the officers' failure to timely administer CPR and to properly alert rescue

that ultimately caused … death." The unlawful seizure, the decedent resisting arrest, and the failure to timely administer CPR were causes-in-fact of death because, but for any one of these things, it was more probable than not that decedent would have lived. *Id.* at 338.

Unlike this case, there was evidence in *Petro* that but for the actions of defendant the decedent would have lived. The facts of *Petro* clearly survive the "but for" test previously set forth by this Court. The Rhode Island court cited to numerous cases that discuss whether causation can be established by a showing that death was hastened. At the end of that discussion, the court indicated that the defendants had not presented any law to the contrary on that issue. As such, the Rhode Island court did not have the benefit of examining contrary case law. As will be shown below, many other jurisdictions have addressed the very issue that is presented in the case at hand and determined that a wrongful death cause of action does not exist in the context of a wrongful death case for failure to diagnose a terminal illness.

Lastly, Appellants rely upon *Heinrich v. Sweet*, 308 F.3d 48, (1st Cir. 2002). While *Heinrich* does deal with a wrongful death action involving individuals with a terminal illness, there has been no showing that Massachusetts utilizes the same causation standard as Missouri. In fact, the *Heinrich* opinion indicates that Massachusetts has adopted a causation standard that is very different from the "but for" test applied in Missouri. Specifically, the standard of causation adopted by Massachusetts is, "that the defendant's negligence caused the plaintiff to die prematurely." *Id.* at 60. Further, the court noted that the instruction given on the wrongful death claim stated that, "to receive

compensatory damages for a wrongful death claim, the defendant had to 'shorten the life' of the decedent." *Id.* No objection was made to this instruction. *Id.* As such, the court noted that any objection on this issue had been waived. *Id.* Additionally, in discussing causation, the Massachusetts court seemed to indicate that it was focusing on establishing proximate causation.

As previously stated, Missouri's standard is that "but for" the actions or inactions of the defendant, the decedent would not have died. *Sundermeyer*, 271 S.W.3d at 554; *Sanders*, 364 S.W.3d at 208. As previously noted, Missouri requires two elements to establish causation. In Missouri, a plaintiff must prove "but for" causation and also establish "proximate" causation. *Sanders*, 364 S.W.3d at 208.

The cases cited by Appellants regarding causation are factually distinguishable from this case. For the most part, the cases cited by Appellants in support of their position are cases where there was a sudden traumatic affirmative act, i.e. an automobile accident or altercation. Appellants reliance upon cases from Massachusetts and Rhode Island are misplaced in light of the binding Missouri precedent that exists on this very issue.

B. Missouri Precedent

In matters similar to the case at hand, Missouri courts have determined that the plaintiff cannot establish causation. *See Wollen*, 828 S.W.2d at 681; *Super*, 18 S.W.3d at 511; and *Morton*, 904 S.W.2d at 14. These cases illustrate that a cause of action for wrongful death based upon medical negligence for failure to diagnose requires the plaintiff to establish that the decedent would not have died; there is no legal precedent

that allows a cause of action based upon the failure to prolong life. The opinions of these cases are in keeping with the causation standard enunciated by this Court in *Sundermeyer* and *Sanders*.

As discussed in great detail supra in section II, A, *Wollen* determined that a wrongful death cause of action did not exist in a scenario where there was no known cure for the disease and the most that medicine could do is extend the patient's life a short time. *Wollen*, 828 S.W.2d at 682. The court noted that a cause of action existed in the situation where the patient seeks treatment and diagnosis at the time where there is a cure that works in the overwhelming majority of circumstances and death at that stage is rare, unless the doctor is negligent. *Id.* The court further developed a cause of action for lost chance of survival where there was a statistical chance of recovery. *Id.* at 684. In those cases, negligence can be established when the doctor destroys the statistical chance of recovery due to his negligence. *Id.* However, in the situation where there was no known cure, this Court indicated that no cause of action existed. *Id.* Here, Mr. Mickels had no statistical chance of recovery and there was no cure for his illness. Accordingly, no cause of action exists because there is no causation.

The factual scenario in the matter at hand is similar to the matter of *Super v. White*, 18 S.W. 3d 501 (Mo. App. W.D. 2000). In *Super*, an individual's family brought a wrongful death action against a doctor and medical services company. They claimed that the doctor's negligence resulted in the death of the individual. However, the individual had a terminal illness, cirrhosis of the liver. *Id.* The medical experts in the case testified that cirrhosis of the liver caused the individual's death and that they could

not point to any specific act performed by the doctors which caused the patient to die. *Id.* The trial court granted defendants' motion for summary judgment. *Id.* at 511. On appeal, the Missouri Court of Appeals for the Western District endorsed the Missouri Supreme Court's rule that, "[I]n wrongful death action, plaintiffs must establish that, 'but for' the actions or inactions of the defendant, the decedent would not have died. This requirement exists because the term *but for* refers to an absolute minimum for causation; it is merely causation in fact." *Id.* at 516. (*Citing Callahan*, 863 S.W.2d at 862). The court further determined that while the actions of the doctors at best may have accelerated the patient's death, the actions were not the cause of the patient's death. *Id.* The Court held "an action cannot be brought under the wrongful death statute, §537.080, where the cause of death was merely accelerated." *Id.* (Relying on *Wollen*, 828 S.W. 2d at 681-83).

Moreover, in the case of *Morton v. Mutchnick*, 904 S.W.2d 14 (Mo. App. W.D. 1995), the court held that no cause of action for wrongful death existed where the patient had a terminal illness. In *Morton*, the decedent had AIDS. *Id.* at 15. The plaintiffs alleged that the defendants negligently failed to diagnose and treat the decedent for AIDS and as a result his condition worsened and his death was hastened. *Id.* The plaintiffs alleged that but for the negligence of the defendants the decedent would have lived longer. *Id.* The defendant's filed for judgment on the pleadings and the trial court granted the request. *Id.* at 14. On appeal, the Missouri Court of Appeals for the Western District indicated in its discussion that it viewed AIDS as a terminal condition. *Id.* at 15. The court determined that the failure to diagnose the terminal illness did not cause the

decedent's death; the death resulted from the disease itself. *Id.* at 16-17. This failed to establish "but for" causation. *Morton* is similar to the case at hand in that Mr. Mickels' death was brought about by his brain cancer, and not any alleged misdiagnosis by Dr. Danrad.

In *Morton*, the appellants tried to argue that the hastening of death met the causation requirement and that the doctor's hastening of death was akin to a criminal defendant who murders a terminally ill patient. *Morton*, 904 S.W.2d at 16. The court in examining that issue noted, "An incurable disease does not prevent one from maintaining a successful cause of action for damages." *Id.* The court, even in light of an argument similar to the one being made by Appellants, stated as follows:

> The harm that the plaintiffs claim was suffered was not the loss of life, but rather, a shortening of life. The plaintiffs cannot prove that the patient's death, based on reasonable medical or scientific certainty, resulted from the defendants' failure to diagnose his pre-existing AIDS condition. To prove a cause of action under the wrongful death statute, the plaintiffs must plead and prove that the death of the decedent resulted from the defendants' negligence. It is not the failure to diagnose Mr. Morton's condition that caused his death, his death resulted from pre-existing disease. There are no facts showing a causal connection between the defendants' negligence and Mr. Morton's death because the facts alleged do not state that *but for* the defendant's negligence Mr. Morton would not have died. *Morton*, 904 S.W.2d at 16-17. (Citing *Callahan,*, 863 S.W.2d at 852).

Even in light of the foregoing and as discussed supra in 2, A, the court in *Morton* noted that there are facts and circumstances in which a plaintiff with a terminal illness can maintain a wrongful death action. *Morton*, 904 S.W.2d at 16. Specifically, the court noted, for instance, that "one who murders, is by definition, the competent force that brings about death." *Id.*

Like the decedent in *Morton*, Mr. Mickels had a terminal condition. The undisputed facts establish that Mr. Mickels had terminal cancer. LF0136, #19. The type of cancer that Mr. Mickels had was fatal. LF0136, #19. Mr. Mickels was going to die from the type of brain tumor that he had. LF0138, #25. Even if the tumor had been discovered in December 2008, the cancer would have been incurable. LF0137, #23. Because of the type of tumor that Mr. Mickels had, his prognosis was grim. LF0134, #11. This was the testimony of Appellant's own expert witnesses. As such, Appellants cannot establish causation.

Additionally, Appellants' assertion that *Super* is no longer good law in light of *Collins* is erroneous. In 2009, the Court of Appeals for the Eastern District of Missouri, expressly recognized and approved the holdings of *Super* and *Morton*. In *Watson v. Tenet Healthsystem SL, Inc*., the Eastern District reviewed the denial of a motion for judgment notwithstanding the verdict to determine whether the plaintiff made a submissible case for wrongful death based upon medical negligence. *Watson*, 304 S.W.3d at 240. The defendants in the underlying matter claimed that the judgment notwithstanding the verdict should have been granted as the plaintiff had failed to present evidence of causation. *Id.* at 239. The court stated, "With respect to the element of

causation in a wrongful death action, a plaintiff must prove that, but for the defendant's actions or omissions, the patient would not have died." *Id.* *(Citing Super*, 18 S.W.3d at 516). Thus, the Eastern District noted that *Super* was still good law with respect to causation in the context of a wrongful death action.

C. Decisions of Other Jurisdictions

When confronted with facts similar to those at issue, other jurisdictions have held that a cause of action for wrongful death cannot proceed. Generally, these courts have held that the incurability of a disease precludes a finding of causation in a wrongful death action based upon medical negligence.

In a case with very similar facts, the Fourth District of Florida determined that a cause of action for wrongful death did not exist. *Tappan v. Florida Medical Center*, 488 So. 2d 630 (Fla. Dist. Ct. App. 1986). In *Tappan*, a widow filed a wrongful death action against her deceased husband's chiropractor alleging medical malpractice.[4] *Id.* at 630.

[4] The Florida Wrongful Death Statute is similar to Missouri's Wrongful Death Statute and provides, "When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony." FLORIDA STATUTE § 768.19.

The widow alleged that the doctor failed to diagnose decedent's lung cancer during the time that he was treating the decedent for "back and other pain." *Id.* The doctor filed a motion for summary judgment. *Id.* In opposition to the motion, the widow attached affidavits from two doctors that stated that if decedent had received "treatment for cancer at the time he was treated by [the defendant], he would have lived six or eight months longer." *Id.* The court granted defendant's motion for summary judgment concluding that since the defendant did not cause the death there were no recoverable damages. *Id.* at 630-31.

The widow appealed the trial court's grant of summary judgment. On appeal, the Florida court stated that the case was not a lost chance of survival case because everyone conceded that the decedent's cancer was incurable. *Id.* at 631. The court further held that the matter could not be pursued under the wrongful death act "because of traditional causation principles, which require proof under the but-for test." *Id.* The case could not proceed under the wrongful death statute because the alleged negligence in failing to diagnose the cancer was not a cause-in-fact of death and the widow could not prove that with proper diagnosis and treatment it was "more likely than not" the decedent would have survived. *Id.* Accordingly the court upheld the grant of summary judgment.[5] *Tappan,* 488 So.2d at 631.

[5] In *Tappan,* the court did note that upon the facts presented the appellant could maintain a survival action. The survival action was not based upon lost chance of recovery or

Two years prior to *Tappan*, the Florida Supreme Court reached a similar decision in *Gooding v. University Hospital Building, Inc.* 445 So.2d 1015 (Fla. 1984). In *Gooding*, a personal representative filed a wrongful death action against a hospital alleging medical malpractice. The Florida Supreme Court certified the following question for review: "Whether plaintiff in a wrongful death action must prove that more likely than not the death was caused by defendant's negligence." *Id.* at 1017. The facts of the case were that decedent was suffering from lower abdominal pain and fainted in his home. *Id.* The decedent went to defendant's emergency room. *Id.* The emergency room staff failed to take a history or examine decedent. Thereafter, decedent's symptoms worsened and he suffered cardiac arrest and died. *Id.* The autopsy revealed that decedent died from a ruptured abdominal aortic aneurysm which caused massive internal bleeding. *Id.*

Decedent's expert did not testify that immediate diagnosis and surgery would more likely than not have enabled decedent to survive. *Id.* The court noted that in Florida, to prevail on a medical malpractice claim, the plaintiff must establish: the standard of care owed by the defendant, the defendant's breach of the standard of care, and that said breach proximately caused the damages claimed. *Id.* at 1018. In examining the causation element, the court noted that it followed the more likely than not standard of causation and required proof that the negligence probably caused the plaintiff's injury.

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wrongful death. Instead, the survival action was based upon and created by a specific Florida Statute.

Id. The Court then held that its review of the evidence showed that decedent had "a no better than even chance … to survive, even had there been an immediate diagnosis of the aneurysm and emergency surgery. Therefore, a jury could not reasonably find that "but for" the negligent failure to properly diagnose and treat [decedent] he would not have died." *Id.* The court noted that it could not relax the causation standard as doing so would create an injustice to health care providers who "could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result."

A California court examined a similar issue in *Bromme v. Pavitt*, 5 Cal. App. 4th 1487 (Cal. App. 3d 1992). In *Bromme*, the decedent's husband filed a wrongful death action against a physician who failed to diagnose colon cancer. *Id.* The evidence at trial suggested that before June 1981 it was medically probable that if the cancer had been detected it could have been successfully treated. *Id.* at 1492. After June 1981, successful treatment became medically improbable in that the chance of success was less than 50 percent. *Id.* The trial court granted a partial nonsuit, precluding the jury from considering any alleged negligence acts on the part of defendant occurring after June 1981. The trial court reasoned, "this is a [wrongful] death case' and '[i]t's more probable that after June of [1981] the cancer killed her than anything the doctor failed to do." *Id.* On appeal, the court stated that in a wrongful death action, the plaintiff must prove that the death was "caused by" the defendant's wrongful act or neglect, i.e. "the wrongful act

or neglect was a cause in fact of the death."[6] *Id.* at 1487. Under California law, to be a cause in fact the act must be a "substantial factor in bringing about" the death.[7] *Id.* at 1487. "Ordinarily, 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.'" *Id.* (Quoting Rest. 2d Torts, § 432(1), p.430). Even if the matter was viewed as involving two forces (the cancer and the failure to diagnose), plaintiff still had to prove the failure to diagnose was sufficient to bring about the harm. *Id.* The failure to diagnose was only sufficient to bring about the death if when the failure to diagnose occurred, the chance of survival was greater than 50 percent. *Id.* at 1499. Where the chance of survival, even with proper medical intervention, is less than 50 percent, it is more likely than not that the individual died from the disease itself than from the alleged negligent act or omission. *Id.* The court reasoned that where the survival rate is less than

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[6] The California Wrongful Death Statute states: "When the death of a person is caused by the wrongful act or neglect of another, his or her heirs … may maintain an action for damages against the person causing the death…" *Bromme,* 5 Cal.App.4th at 1497.

[7] Missouri does not utilize the substantial factor test. *See Callahan,* 863 S.W.2d at 861-63. Missouri has adopted the "but for" standard of causation, which requires a showing that "but for" the actions or inactions of defendant, the decedent would not have died. As such, the test for causation in Missouri is more rigorous than causation established through the substantial factor test.

50 percent, it is more likely than not that the failure to diagnose did not contribute to the death. *Id.* at 1499-1500.

A Georgia court of appeals examined whether summary judgment was appropriate on a wrongful death claim where plaintiff argued the decedent died prematurely as the result of a misdiagnosis of a terminal illness in *Dowling v. Lopez,* 440 S.E.2d 205 (Ga. Ct. App. 1994). In *Dowling*, the defendant began treating on November 19, 1987 for abdominal pain. *Id.* at 206. On February 22, 1988, surgeons discovered that decedent had terminal cancer that originated in her bowels. *Id.* Decedent died on April 24, 1988. *Id.* The court in examining whether a claim for wrongful death could be established by a showing that the death occurred prematurely stated that the wrongful death statute provides for an action that is not available at common law. *Id.* at 207. The statute did not provide for recovery where the wrongful act or negligence did not result in death. *Id.* at 208. Where plaintiff's argument was that "decedent's life could have been prolonged (rather than saved) had it not been for defendant's alleged malpractice" it did not meet the causation requirement. *Id.* The court held that a cause of action did not exist for "recovery for loss of chance of extended survival." *Id.* Specifically, the court stated, "there can be no recovery in a wrongful death action based on medical negligence where there is no showing to any reasonable degree of medical certainty that that patient's death could have been avoided." *Id.* The court further noted that there was "no proof that the

decedent did not have terminal cancer when defendant first treated the decedent."[8] Given the evidence, the court concluded that the misdiagnosis of decedent's cancer was not the proximate cause of decedent's death. *Id.* at 209.

Importantly, the holding of *Dowling* was revisited by the Georgia court of appeals in *Pruette v. Phoebe Putney Memorial Hosp.*, 671 S.E.2d 844 (Ga. Ct. App. 2008). In *Pruette*, the court distinguished the holding of *Dowling*. The distinction made by the court in *Pruette* strongly support's Respondent's argument in this case. The Appellants in this case essentially argue that if their position is not adopted by this Court that a wrongful death action could not proceed when the individual who dies has a terminal illness because, as Appellants say, the shortening of life is the loss of life. However, as is shown in *Pruette*, Respondent's position in this case is sound and is limited to the narrow range of cases where the individual dies from the same terminal illness that the doctor is alleged to have missed.

In *Pruette*, a wrongful death action based upon medical negligence was filed against a physician alleging that the patient died due to a nurse's administration of an overdose of morphine. *Pruette*, 671 S.E.2d at 846. The decedent was 79 years old and suffered from end-stage chronic obstructive pulmonary disease. *Id.* The decedent had been hospitalized for her condition on a number of occasions and during one hospital trip

[8] The same situation would be applicable in the case at hand as the undisputed evidence is that whether decedent's cancer was diagnosed in December 2008 or February 2009, it was terminal.

had been intubated and placed on mechanical ventilation. *Id.* On this occasion, decedent was taken by ambulance to defendant doctor's hospital. *Id.* Decedent was admitted to the hospital and during her stay, she coded, but was revived. *Id.* At the time that she was revived, the doctor's believed her chance of survival was almost none and at that time the decedent's power of attorney agreed that no further life-saving measures should be administered. *Id.* at 847. Thereafter, one of the doctors ordered morphine to be administered two milligrams every thirty minutes. *Id.* The decedent received this dose and appeared to respond in a positive manner. *Id.* Approximately five minutes later, another doctor, ordered that a single push of 20 milligrams of morphine be administered to decedent. *Id.* Upon receipt of the 20 milligram dose, decedent's eyes closed and she died three and a half hours later. *Id.*

Thereafter, plaintiff filed a wrongful death action against the doctor who ordered the administration of the 20 milligrams of morphine. *Id.* The doctor filed for summary judgment arguing that the morphine did not proximately cause decedent's death. *Id.* The doctor claimed that the evidence showed that decedent died from her underlying condition, end-stage COPD. *Id.* The doctor relied upon *Dowling v. Lopez* to argue that there was no cause of action for loss of chance of extended survival. *Id.* at 848. The court distinguished *Dowling* indicating that facts before it did not involve the "failure to diagnose an incurable disease." *Id.* at 849. Rather, the court noted, this was a case where "there was evidence that the death resulted from the affirmative conduct of the defendant physician, not by the decedent's underlying medical condition. *Id.* Specifically, the court stated:

> *Dowling* stands for the proposition that proximate cause cannot be established in a failure to diagnose case, if the decedent suffered from an incurable medical condition at the time of the alleged misdiagnosis. In that narrow category of cases, proof of proximate cause fails as a matter of law because the plaintiff cannot demonstrate that the death of the decedent was caused by anything other than the decedent's underlying disease process. *Id.*

This is the same standard that should apply and is applicable to the matter at hand.

Lastly, the United States District Court for Kansas, has determined that causation on a wrongful death claim for failure to diagnose cannot be established where the facts show that nothing could have been done to cure the cancer or to give the decedent a substantial chance of survival.[9] *Elloitt v. Kitowski*, 786 F.Supp. 917 (D. Kan. 1992). In

[9] Other jurisdictions have also held that a cause of action for wrongful death does not exist in situations similar to the one at hand. *See, Parrott v. Caskey*, 873 S.W.2d 142 (Tex. Ct. App. 1994) (holding that wrongful death action for failure to diagnose breast cancer could not proceed where plaintiffs argument was that the actions of the defendant caused the decedent to die prematurely. Instead, a wrongful death action could only proceed where the actions *cause* death and negligent conduct is only the cause of harm if, in a natural and continuous sequence, it produces an event, and without the negligent conduct such event would not have occurred); *Ferrara v. South Short Orthopedic Associates, P.C.*, 178 A.D.2d 364 (N.Y. App. Div. 1991) (holding that a seven week

Elloitt, the defendant doctor took a series of x-rays on June 21, 1987 which he misinterpreted as normal. *Id.* at 919. He then took a second set of x-rays on March 1, 1988 which he misinterpreted as normal. *Id.* In November 1988, another doctor diagnosed the decedent with colon cancer which should have been diagnosed in June 1987. *Id.* Decedent died of the cancer in August 1989. The court noted that in Kansas, a plaintiff in a medical malpractice action bears the burden of showing not only the doctor's negligence, but that the negligence caused the injury. *Id.* at 918. The court viewed the two sets of x-rays separately but noted with respect to causation for the second set of x-rays that the issue was whether the cancer had metastasized at the time the x-ray was taken. *Id.* at 919. The metastasis was crucial as if it had occurred, death

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delay in diagnosing already incurable lung cancer did not cause or contribute to cause the patient's death and a wrongful death action could not proceed as the patient's prognosis was not affect by the delay in diagnosis nor did the misinterpretation of the study adversely impact the decedent's course); *Thompson v. Anderson*, 252 N.W. 117 (Iowa 1934) (holding that delay in diagnosis of tetanus was not the proximate cause of decedent's death as at the time tetanus was generally incurable and the evidence did not establish that the death of decedent would not have resulted from tetanus regardless of any actions on the part of defendant doctor); *Burke v. Miners Memorial Hospital Association*, 381 S.W.2d 758 (Ken. 1964) (holding that in a malpractice action proximate cause could not be established where the evidence showed that death would occur even if the doctors were negligent).

was inevitable. *Id.* The court determined that with respect to the May 1988 x-rays that even if the x-ray had been properly interpreted, "nothing could have been done either to cure the cancer or to give [decedent] a substantial chance for survival." *Id.* Since the court determined that as of March 1988 the cancer was terminal, there was nothing that the doctor did or failed to do that had any causal bearing on the decedent's chances for survival and his fate was sealed. *Id.* at 920.

In light of the precedent from other jurisdictions, in factually similar cases, Missouri's current standard of causation is correct. A plaintiff must show that "but for" the defendants actions or inactions the decedent would not have died. The standard is not that the decedent would not have died "at that time." Accordingly, given the causation standard in Missouri, the trial court's grant of summary judgment to Dr. Danrad should be affirmed.

IV. Plaintiff's own expert's testimony does not meet the requisite standard and is not sufficient to support causation

In medical negligence cases, causation requires a degree of expertise and a Plaintiff must present expert testimony to establish causation. *Sanders*, 364 S.W. 3d at 208. Proof of causation requires expert medical testimony "[w]hen there is a sophisticated injury, requiring surgical intervention or other highly scientific technique for diagnosis." *Brickey v. Concerned Care of the Midwest, Inc.* 988 S.W.2d 592, 596 (Mo. App. E.D. 1999). As such, expert medical testimony is necessary to establish that the negligence of a health care provider "has some causal connection with the injury except where the want of skill or lack of care is so apparent as to require only common

knowledge and experience to understand and judge it." *Tillman by Tillman v. Elrod*, 897 S.W.2d 116, 118 (Mo. App. S.D. 1995). "When a party relies on expert testimony to provide evidence as to causation when there are two or more possible causes, that testimony must be given to a reasonable degree of certainty. *Tompkins v. Cervantes*, 917 S.W.2d 186, 189 (Mo.App.1996). "When an expert merely testifies that a given action or failure to act "might" or "could have" yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value." *Tompkins*, 917 S.W.2d at 189.

In *Super*, the expert testified that it was both possible and not possible that certain treatment led to the decedent's death. *Super*, 18 S.W.3d at 517. The expert also testified that he could not say with reasonable medical certainty that the doctors actions caused the decedent to die. *Id.* The court noted that where an expert merely "testifies that a given action or failure to act 'might' or 'could have' yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value." *Id.* at 516. When a plaintiff can only allege that the negligence of the defendant might have contributed to the death of the individual, the plaintiff has not met his or her burden. *See Wollen*, 828 S.W.2d at 683.

Here, the testimony of Dr. Carl Freter does not establish that Mr. Mickels absolutely would have lived six months longer. Instead, Dr. Freter's testimony only established the Mr. Mickels might have lived six months longer. Dr. Freter testified as follows:

> Question: And I just want to make sure, when you're using the term "guesstimate" could you –I mean, that still your medical opinion.

Answer: Right.

Question: What you're saying is –

Answer: It's my medical opinion that more likely than not that if this had been discovered earlier, as had been alleged, then he would have lived an additional six months **on the average.** (LF0130, L: 13-21).

In addition, Dr. Carl Freter stated as follows:

The witness: in general under these conditions with this tumor having been discovered earlier in this sort of hypothetical question I am being asked, then it's my opinion the patient would have lived a number of months longer.

Question: Okay.

Answer: And if you want me to make a guesstimate of that, I will. If you don't want me to guess, then I won't.

Question: What's your best estimate or your best guess?

Answer: Okay, my best guesstimate is that it would have been on the order probably in this case of **on the average perhaps** six months (LF0123, pg. 31, L: 10-23).

Dr. Freter also testified:

Question: Then he maybe would have had six months longer?

Answer: Yes, on average. Now he might have had a year. He might have had, you know, less than six months. It's hard to tell. (LF0132; pg. 33, L:12-16).

The testimony of Dr. Freter only establishes that Mr. Mickels might have lived longer. Dr. Freter could not unequivocally state the Mr. Mickels would have lived six months longer, and in fact, Dr. Freter admitted the Mr. Mickels might not have lived six months. Accordingly, Plaintiffs have not established causation to a reasonable degree of medical certainty and their claim fails.

CONCLUSION

Under Missouri's standard of causation, Appellant's cannot establish that Respondent caused Mr. Mickels's death. To meet their burden of proof, Appellants have to establish that "but for" that actions or inactions of Respondent, the decedent would not have died. Appellants cannot establish that Mr. Mickels would not have died. In fact, it is clear from the undisputed facts that even if Mr. Mickels's cancer had been diagnosed in December 2008, he still would have died from the cancer. The cancer caused Mr. Mickels's death irrespective of any action on the part of Dr. Danrad.

Furthermore, Appellants cannot establish that Raman Danrad, M.D. was the proximate cause of Mr. Mickels death. Mr. Mickels' death was not the natural and probable consequence of any actions on the part of Raman Danrad, M.D.; instead, Mr. Mickels' death was the result of his terminal cancer.

Lastly, Missouri does not recognize a cause of action for the shortening of life in the context of failure to diagnose a terminal illness. Instead, Missouri's precedent on this issue is in keeping with the decisions of numerous states which hold that a cause of action cannot be maintained for wrongful death based on the failure to timely diagnose a terminal illness.

In keeping with Missouri's precedent on this issue, the judgment of the trial court was correct and should be affirmed by this Court.

Respectfully submitted,

By /s/ John B. Morthland

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c) this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and contains 12,168 words as determined using the word count program in Microsoft Word.

/s/ John B. Morthland

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Court's electronic filing system on this 10th day of August, 2015, to:

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With a paper copy mailed, via first class U.S. mail to:

Honorable Rachel Bringer Shepherd
Judge of the Circuit Court of Marion County
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906 Broadway, Room 105
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/s/ John B. Morthland